APPENDIX.

STATEMENT OF THE FACTS AND THE ACTUAL DECISIONS THEREIN IN THE CASES CITED BY MR. JUSTICE HAGNER IN THE M'INTIRE CASES.

We beg leave to submit to the careful attention of the court this result of our examination of the above cases. If the court will do us the honor to follow us in our examination of them, it will find that *not a single one* of the twenty-two cases cited shows *actual fraud* found. On the contrary, in almost every case the bill could have been dismissed (and in many of them such was the acutal decision) on other grounds than laches. In every case the court found either that the fraud charged was not proved or if proved was merely a case of *constructive* fraud.

On the other hand, we have already shown to the court numerous cases of actual fraud by trustees, where the court, having, as it was bound to do, considered the evidence in support of the charge of fraud, found the charge sustained, and thereupon rejected the defendant's plea of laches.

We state with the utmost confidence that we believe *no* case can be found in the Supreme Court reports in which the bill was dismissed on the ground of laches where *actual* fraud was charged against a trustee of real estate and the bill was filed within twenty years of the discovery of the fraud. If there be such a case, we do not know of it, and we deem it the duty of defendant's counsel to refer us to it if there be such. We now proceed to examine the cases cited by the court below :

1. McKnight *vs.* Taylor, 1 How., 161–167. In this case a deed of real estate was made in 1813 upon trust to pay certain creditors if by the 16th of April, 1818, they should

not have been otherwise paid. The bill was filed in 1837 by *a single one* of all the numerous creditors who had been originally secured, a fact which the court comments on as throwing *doubt* upon the plaintiff's claim. *No fraud of any kind* was charged. The owner of the land claimed that the debt had been paid, and the Court seemed to incline to the same opinion.

Chief Justice Taney, delivering the opinion, said:

"In relation to this claim, it appears that *nineteen years and three months* were suffered to elapse before any application was made for the execution of the trust by which it had been secured. No reason is assigned for this delay, nor is it alleged to have been occasioned in any degree by obstacles thrown in the way by the appellant. As the record stands, it would seem to have been the result of mere negligence and laches. The original creditors were in business ten years after the deed was made and five years after the expiration of the credit which it gave to McKnight and Stewart, and, as they became insolvent in 1823, it must be presumed that in the last-mentioned period they were themselves pressed for money. The property is situated in the town of Alexandria, where the laws of Virginia have been adopted by Congress, and the trustee, under these laws, *had an undoubted right to sell*, upon the application of any creditor, as soon as default was made without asking the interposition of the court of chancery. Such delay under such circumstances by the original creditors, followed *by fourteen years' more* by the assignees who afterwards had charge of this claim, can, perhaps, hardly be accounted for without supposing that *this debt had been nearly, if not altogether, satisfied* in the manner suggested in the answer of the appellant. If, indeed, the suit had been postponed a few months longer, twenty years would have expired, and in that case, according to the whole current of authorities, the debts in the schedule would all have been presumed to be paid."

Without reference to the delay, this cause might well have been dismissed on the merits for lack of evidence.

2. In Badger *vs.* Badger, 2 Wall., 87–93, the court says of the case before it that it had "none of the peculiar charac-

teristics of those cases *where the successful fraud of a trustee only made an aggravation of the offense.*"

"For more than *twenty-five* years the widow and heirs have acquiesced in this sale, and it is more than thirty since the administration account was settled, which is alleged to have been fraudulent. The guardian of the complainant, who approved the account, is dead. The widow died in 1855. Two of the heirs were of full age in 1831 and the others afterwards. This bill was filed in 1850. The bill does not state the age of complainant at the time of filing his bill. He must have been over forty years of age. The whole transaction was public and well known to the widow and the heirs and their guardians. The purchase of the estate by the administrator could have been avoided at once if any party interested disapproved it. There was not and could not be any concealment of the facts of the case—that complainant claims as assignee of his elder brothers and sisters and uses them as witnesses to prove the alleged fraud *after a silence of over thirty years.* They attempt to prove the signature of their mother to the documents on file in the court to be forged, and this after the death of the mother, who lived for twenty-eight years after the transaction without complaint or allegation either that her signature was fraudulently obtained or forged. A daughter, who was twenty-three years of age when this sale was made and had full knowledge of the whole transaction, after near thirty years' silence, now comes forward to prove that her concurrence and assent was obtained by fraud, and now, after the death of the guardian and the mother, who could have explained the whole transaction, the aid of a court of chancery is demanded to destroy a title obtained by judicial sale after the parties complaining, with full knowledge of their rights, have slept upon them for over a quarter of a century."

So it appears that this was a case of *acquiescence* and not of laches, the distinction between which is well recognized by the courts.

3. Stearns *vs.* Page, 7 How., 819. This case related to personalty, the analogous statutory bar being six years.

The court itself states the facts and its reasons for finding laches, reasons that commend themselves to every lawyer.

After premising that the charges of fraud were vague and that *no fraud, misrepresentations, or concealment* had been practiced by the defendant and "made palpable to the court," such as would justify the account to be opened and taken *de novo*, the court says:

"In this case the complainant seeks to open an account stated and settled twenty-six years before the filing of his bill, and this account not rendered by the defendant to a woman unacquainted with business and received by her without examination, but stated from the books by referees or arbitrators chosen for the purpose, and in the nature of an award between the parties, executed and *acquiesced* in by both without complaint for a quarter of a century."

Moreover, the accountant was dead, and had been for more than twelve years. Of course the bill was dismissed, and properly so.

4. Hoyt *vs.* Sprague, 103 U. S., 613. The subject-matter in controversy in this case was personalty—stocks and bonds, etc. It was not a case of laches at all, but of *consent and acquiescence*, with abundant knowledge for over ten years, and so found by the court. During all that time they had taken the benefit of the transaction complained of—received dividends, etc. Furthermore, so far from finding fraud, the court found that the party complained of was "actuated by the *most worthy motives*," and said:

"Without further discussion, it suffices to say that the complainants came into court too late for relief, *even if when they came of age they could have justly complained of the conversion* of their property into the stock of the corporation."

5. In Hammond *vs.* Hopkins, 143 U. S., 225, the court found as matter of fact that there was *no fraud* whatever, but that the party complained of acted from pure motives and during all the time had in good faith believed he was

honestly the owner of the property. The delay to complain was within a month or two of twenty years, when the statutory bar would have been complete.

6. In Galliher *vs.* Caldwell, 145 U. S., 369, *no fraud was charged*, and the court said, aside from the question of laches, it was exceedingly doubtful whether the plaintiff had a superior equity to the defendant's legal title.

7. In Foster *vs.* Mansfield, 146 U. S., 89, the bill was filed ten years after a foreclosure sale to set it aside. The court held, 1st, that the alleged acts of collusion and fraud were *patent on the face of the proceedings;* 2d, that even if the sale were set aside it did not appear (the property being incumbered) that it would result *in any benefit to the complainant, and a court of equity is not called upon to do a vain thing.* So that the bill would have been dismissed if it had been filed the day after the sale. Laches had nothing to do with it, and the equity was clearly with the defendant.

8. Johnston *vs.* Standard Mining Co., 148 U. S., 370. The court seemed to be of the opinion that the plaintiff had *consented* to the formation of the corporation and of the transfer to it of the mine, in which case, said the court, "he clearly waived his right." There was also, said the court, "a circumstance proper to be considered as bearing on the equities of this defense, viz., "that at the time of the institution of this suit a large proportion, if not a majority, of the stock of this company" had passed into the hands of another company, "one-half, if not a majority, of the stockholders of which were *bona fide purchasers for value without notice.*" In addition to this, the property was mining property which, at the time the cause of action arose, was worth about $4,800, while at the time of bringing suit it was worth *over a million dollars*, "developed by the courage and energy and at the expense of the defendants." The court also found many

other circumstances which were against the merits of the case itself without reference to the delay in bringing suit, and, lastly, there was "*no clear proof of fraud.*" In conclusion the court quoted from Twin Lick Oil Co. *vs.* Marbury as to the fluctuating value of mining property and the injustice of permitting one holding the right to assert an ownership in such property "to voluntarily await the event and then decide, *when the danger, which is over, has been at the risk of another,* to come in and share the profits." The case was really one which could have been dismissed upon the merits or upon the doctrine of estoppel without reference to the delay in bringing suit, but the whole case is utterly unlike those at bar and cannot be used as a precedent for the court's action here. The fact is it often happens, whenever a suit without merit is brought after long delay and the plaintiff, as a matter of course, fails in his proof, judges, while commenting upon the failure of proof, which of itself is sufficient ground to dismiss the bill, very naturally, yet unjudicially, lapse into an expatiation upon the law of stale claims and laches, which, although it may be very sound doctrine, is nevertheless *obiter* in the case itself. Mr. Ram, in his excellent work upon Legal Judgment, comments upon this practice of judges, after having decided a case, straying off to express opinions not necessary to be expressed. It is equally as objectionable when other judges cite these obiter expressions as judicial authorities upon which to base their decisions, when in point of fact they are but the mere rhetoric of the case.

9. In Lane & Bodley Co. *vs.* Locke, 150 U. S., 193, a case of *personalty*, Locke, while in the employ of L. & B. and using their tools and patterns, invented a stop-valve in 1872. Until he went out of the employ of L. & B., in 1884, he permitted them to use his patent without claim for remuneration. After leaving their employ he filed his bill. The case, said the court, was fairly brought within the doctrine

of those cases which declare that where an employé assents to the use by his employer of his invention the court is warranted in finding he has so far "recognized the obligations of service flowing from his employment as to have given to such employer an irrevocable license to use his invention," and it was upon this ground and not laches that the bill was dismissed.

10. In Harwood *vs.* Railroad Co., 17 Wall., 80, a bill was filed five years after a completed judicial sale to set it aside as fraudulent. The bill was dismissed *not* on the ground of laches, but *because of want of proper parties to the suit.* Incidentally the court spoke of the delay, saying that it was fairly to be inferred that during all the time the plaintiffs had knowledge of the proceedings as they progressed, &c., &c.

11. Twin Lick Oil Co. *vs.* Marbury, 91 U. S., 587. In this case the court said that "there was no *actual* fraud." It also expressed its doubt as to the sale being invalid, as was claimed by the plaintiff. "The doctrine," it said, "is well settled that the option to avoid such a sale, viz., an invalid sale of mining property, must be exercised within a reasonable time," the property being mining property and of fluctuating value. It, said the court, must hold to the principle [clearly the principle of estoppel] "that no delay for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably to himself whether he will abide by his bargain or rescind it is allowed in a court of equity." That the plaintiffs had fairly shown themselves to be *estopped* by their conduct is evident from the language of the opinion, and that that was the reason for the decision is still further evident from the following language: "*As there was no actual fraud*, they knew all the facts on which their right to avoid the contract depended. They not only refused to join the defendant in the purchase when the privilege was tendered

them, but they generally refused to pay assessments on their shares already made *which might have paid the debt.*" Laches had nothing whatever to do with the *decision*, and therefore the case cannot be cited as an authority upon that question, unless obiter and fine rhetoric is authority.

12. Brown *vs.* Buena Vista, 95 U. S., 157, a case of *personalty.* The complainant filed his bill to set aside a judgment upon the ground of fraud. The bill was filed some five years after the judgment was obtained, and though the court found there was "some" fraud by *other persons* in obtaining the judgment, yet it acquitted *the two defendants* "of anything wrong." The case seems to have turned somewhat upon the well-known reluctance of a court of equity to disturb judgments at law when with proper diligence the defense could have been availed of in the proceeding itself, and also because courts of equity more readily apply the doctrine of laches and delay where it is sought to open a judgment of long standing than it will in almost any other case. The defendant in the case was a municipality, not a widow and orphans and ignorant colored persons imposed upon by the misrepresentations of their trustee. There was nothing in it of those well-known equities which appeal so strongly to courts of equity, such as there is in the cases at bar.

13. Hayward *vs.* Nat'l Bank, 96 U. S., 611. This case also relates to *personalty.* The court decided, first, that it had *no jurisdiction* to grant the relief prayed for, even if the facts charged had been proved. It held, however, that they had not only *not been proved*, but that the defendant bank was clearly justified in its action (foreclosing securities) and the case of the plaintiff was entirely without merit, and, finally, even if the bank had originally acted without authority the plaintiff had *elected* to abide by the sale and could not recall that election merely because the stock had

largely risen in value. Although the court laid down some of the general principles of the doctrine of laches, it is perfectly clear that the case was not decided upon that ground at all.

14. Davidson *vs.* Davis, 125 U. S., 90, still another case of *personalty*. It is as utterly unlike the cases at bar as it it possible to conceive. Briefly stated, one of the parties had made a conditional sale of certain securities, and, claiming that he was entitled to the return of them, filed his bill some five years after he had failed to perform the condition which would have entitled him to a return of the stock. The court held, first, that even if he had any rights in the matter the frame of his bill prevented any relief being granted; secondly, that he had lost them (if ever he had any) by delay and laches, and, thirdly, that even if his bill had been properly framed to give the relief asked and there had been no laches he could not get the relief, because, the sale having been upon condition and the condition not having been performed, the sale had become an absolute one. What relation such a case has to the facts of the cases at bar it is difficult to comprehend.

15. Holgate *vs.* Eaton, 116 U. S., 33, was a bill for specific performance, which we know is not a claim of right, but rests in the sound *discretion* of the court. The facts were that a husband had agreed to sell the land of his wife; the purchaser prepared the deed and sent it to him for his and his wife's signatures. The wife for more than two years constantly refused, although repeatedly asked to do so, to sign the deed. Suddenly the land fell greatly in value; so that at the price stated in the deed the wife would have received a sum largely in excess of the depreciated value of the land. Under these circumstances she naturally changed her mind and concluded to sign the deed. The proposed purchaser, however, now refused to buy, and the wife accordingly brought suit for specific performance. The court held that

even if the contract was one for specific performance the complainant by her fast and loose conduct had forfeited her rights to such relief. The question of laches had no application whatever to the case. It was decided solely upon the want of "merit" in the complainant's case, as shown by the facts.

16. Societé Fonciéré *vs.* Milliken, 135 U. S., 304, a case of *personalty*. The bill was filed to set aside a judgment for usury two years after the rendition of the judgment. The plaintiff had notice of the judgment. The known unwillingness of courts of equity to set aside judgments obtained at law with notice upon slight grounds and after any considerable period is well known, and if there is any delay excuse must be shown. No excuse was given here for the delay, and the court said of the bill, "Conceding the large amount of the judgment to be just, it attacks only an inconsiderable portion;" and in speaking of the sale under the judgment the court further said, "*No distinct act of wrong is charged * * * and no fact is stated from which the court can deduce misconduct.*" It is needless to say that there is no possible likeness in the case to the cases at bar.

17. Clabaugh *vs.* Byerly, VII Gill, 354. The court doubted exceedingly the merits of plaintiff's case, and said: "*If* there was an equity, he seems to have lost it by delaying for such a length of time to make it known. The deed which he alleges to be fraudulent was executed and recorded 2d September, 1842. The appellee does not pretend that he was ignorant of its existence or of any of its provisions, yet with a knowledge of this deed he pays the money, although it does not appear that he was under any legal obligation to pay it, and never seems to have complained of the deed to the appellant until he filed his bill of complaint, on the 22d of February, 1844." It is plain that the court felt that even on the merits the bill should be dismissed.

18. White *vs.* White, 1 Md. Chanc. Dec., 53, a case of *personalty.* The court said it could not see that the "plaintiffs have any case against this defendant, John C. White, *upon the merits.* * * * He paid it [the money] to the person by whom he was employed to sell the stock without notice of the trust or any circumstance which could awaken a suspicion that the person to whom the payment was made was not entitled to receive the money. * * * To hold him liable under such a state of facts to see to the application of the money would be an extremely hard measure of justice—so hard, indeed, that I should be unwilling to adopt it without the most conclusive authority."

19. Hitch *vs.* Tenby, 6 Md., a case of *personalty,* was a bill filed to open a decree seven years after it was enrolled because, as was claimed, it was based upon a claim affected by usury. The opinion is very brief. Neither counsel nor the court allude to or use the word laches, and the word is not to be found in the whole report of the case. What the court decided is fairly stated in the syllabus, which is as follows:

"If a party, at any time after decree is enrolled and the term passed, has the right to open it because it is based on a claim affected by usury, he must do so within *nine* months by statute after the decree or within the same time after he is informed of the usury."

"When a party at the date of the decree knew of the transactions constituting the alleged usury and did not file his bill for seven years thereafter, it is too late, and his bill will be dismissed."

There might be some persons daring enough to dispute the soundness of the decision in that case, but we are certainly not of them. The decision was right, but how it can be an authority in point for the cases at bar we are unable to see.

20. Nelson *vs.* Hagerstown Bank, 27 Md., 51, was a creditors' bill, and the court was asked by the defendant to enforce a secret agreement to execute a mortgage between a nephew and his aunt for the purpose of avoiding the satisfaction of creditors. It is plain from the review of the evidence by the court that it greatly doubted the *merit* of the defense and the *proof* to sustain it. The case turned upon the effect of the recording acts and not upon laches. That was only an incidental question. The court would have decided just as it did whether laches was a good reply or not.

21. Hall *vs.* Claggett, 48 Md., 223, a case of *personalty*, the bill filed in 1856 to obtain a settlement of partnership accounts after the close of active business of the partnership, in 1842. The bill charged fraud. The court said, "*We fail to discover in the proof any grounds for the charge.*" After reviewing the case, it said: "A mass of testimony has been taken and considered by several intelligent auditors, experts at accounts. After laborious efforts to digest and simplify the same, their reports leave the matter in controversy involved in obscurity and furnish no satisfactory solution of the same *sufficiently reliable to justify a decree in chancery* especially adjudicating the questions involved."

How could a question of delay affect a case which had not been proved? Relief was refused not on account of any alleged laches, but because there was an utter failure to sustain the prayers of the bill by evidence.

22. In Amey *vs.* Cockey *et al.*, 73 Md., 297, the bill was filed on the 15th of December, 1888, by the appellant for the purpose of having vacated and declared of no effect a certain deed executed by herself and brother, James Wise, on the 20th of April, 1848, upon the ground that both she and her brother were infants under the age of twenty-one years at the time of the execution of the deed. The deed was

made to the mother of the appellant, and it was under the mother that the present appellees, as purchasers, derive their title to the premises conveyed by the deed of 20th of April, 1848. At the date of the deed just mentioned the appellant was a married woman and her husband joined in its execution. He died January 3, 1884, within a few days of five years before the bill was filed. The court dismissed the bill on the ground that to sustain the prayers of the bill would be to lend its aid in breaking up a partition after the lapse of *forty* years and after the appellant and her husband had *received and disposed of* their share of the common property and also that assigned to her brother, who shortly after the partition died intestate. This case was an attempt of the appellant to recover the *second time* for the same ground, and the chancellor says: "Fortunately the law tolerates no such injustice." The case was naked and bald of all equity, and the court would not have tolerated the bill or granted the relief prayed even if the bill had been filed much sooner than it was and laches had not been pleaded.